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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 848

STANLEY MARKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–12a) is reported at 352 F. 2d 860.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1965. Petition for rehearing was denied on November 26, 1965. The petition for a writ of certiorari was filed on December 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should reexamine, in light of *Albertson* v. *Subversive Activities Control Board*,

382 U.S. 70, its holdings in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, that the registration requirement of the 26 U.S.C. 4412 does not violate the Fifth Amendment privilege against self-incrimination.

2. Whether this Court should reexamine its holding in *Kahriger* that the wagering tax provisions do not violate the Tenth Amendment.

3. Whether petitioner was entitled to a new trial because of pretrial publicity generated by his arrest.

4. Whether evidence was obtained as a result of an unlawful arrest or seizure.

5. Whether hearsay testimony was admitted which deprived petitioner of his Sixth Amendment right to be confronted with the witnesses against him.

6. Whether petitioner is entitled to a new trial because of the trial court's refusal to instruct as to a lesser included offense.

STATUTES INVOLVED

26 U.S.C. 7203:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon con-

viction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. 7262:

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

STATEMENT

Petitioner was convicted on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. He was sentenced to imprisonment for one year and fined $10,000 on the first count, and he received a suspended sentence and probation for two years on the second count.

During August and September, 1964, a special agent of the Internal Revenue Service placed numerous bets with John Mento at the latter's service station. As each bet was placed, the agent observed Mento dial telephone number 336-0254, ask for "Joe" or "Stash," and repeat the bet. Telephone company records disclosed that the number was an unlisted one in the name of "Mrs. Peggy D'Onofrio," Apartment C-6, 2225 Main Street, Bridgeport, Connecticut, and investigation by revenue agents disclosed no person of that name living at that address. The agents, however, observed petitioner (whose name they did not

know at the time)[1] regularly unlock the apartment and enter it at 11:00 or 11:30 a.m., carrying pads, scratch sheets and newspapers, and remain until 4:45 p.m.; the time petitioner spent at the apartment was the usual period of the day for placing and accepting bets by telephone (Gov. C.A. App. 3a–7a). The records of the district Internal Revenue office disclosed that only eight persons in the State of Connecticut possessed wagering tax stamps at the time, and that none of them resided or had a place of business in Bridgeport (Gov. C.A. App. 8a–9a).

On the basis of the foregoing information, a search warrant for the apartment was obtained on October 1, and an arrest warrant for petitioner (designated by his appearance and as "John Doe, a/k/a 'Joe' or 'Stash,'") was obtained on October 5. Substantially the same information was contained in the affidavit in support of the search warrant and in the subsequent complaint in support of the arrest warrant, except that a separate affidavit setting forth the results of the search of Internal Revenue records was attached only to the former. Both warrants were issued by the same commissioner, and the affidavits and the complaint were all sworn to before him. When the arrest warrant was obtained, the affidavits in support of the search warrant were presented to the Commissioner to refresh his recollection (Gov. C.A. App. 1a–2a).

When execution of the two warrants was attempted, the door to the apartment was at first barricaded;

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[1] Petitioner was later introduced by the nickname "Stash" to the agent who placed the bets with Mento (Pet. App. 2a–3a).

when the arresting agents were finally admitted by petitioner, they found a quantity of paraphernalia useful for the conduct of a gambling business, the telephone (bearing the number 336-0254) torn from the wall, and betting slips flushed down the toilet. When the agents repaired the telephone, unknown voices called and sought to place bets with "Stash" or "Joe." Upon admitting the agents, petitioner acknowledged that he was known by those two names. He was interviewed while still in the apartment (after having his rights explained to him) and asked why he had not purchased a wagering tax stamp. He answered that he did not need one because he did not take bets but only gambled for a living. He said that if he were in the business of accepting wagers he would have registered and purchased the stamp (Pet. App. 3a-4a). Among the items seized by the agents at the apartment (along with sporting newspapers, betting slips, pens for making out such slips, a calendar for checking races, and the telephone) were rent receipts for the apartment and bills for telephone service, none of which were made out in petitioner's name (Pet. App. 6a-7a).

ARGUMENT

1. Petitioner was one of approximately forty-five individuals arrested on October 8, 1964, in connection with violations of the wagering tax statute in the Bridgeport, Connecticut area. His contentions here in regard to the asserted unconstitutionality of the statute when measured against the Fifth and Tenth Amendments are the same as those raised in the peti-

tions filed this term by James Marchetti (No. 823), Frank Costello (No. 826) and Arthur Gjanci (No. 1028 Misc.), and are treated in our combined brief in answer to those petitions. See, also, *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838. Our answer in that brief to the contention in regard to prejudicial pretrial publicity also applies here, with the added observation that—unlike the petitioners in Nos. 823, 826 and 1028 Misc.—petitioner here was not personally named in the press release announcing the arrests; in addition, like the petitioners in Nos. 826 and 1028 Misc., petitioner here requested trial in Bridgeport, where the arrests had taken place and publicity had been the most intense (Pet. App. 2a).

2. Petitioner urges that he was not arrested pursuant to a valid warrant because, in issuing the warrant, the Commissioner relied not only upon the complaint, but also upon two affidavits submitted to him four days previously in connection with the application for the search warrant covering the apartment where petitioner was arrested (Pet. 23–27). The complaint and the two affidavits, taken together, clearly constituted a detailed recital, under oath, of facts showing that petitioner was engaged in the business of receiving wagers without having purchased the necessary stamp. The Commissioner was thus unquestionably enabled "to assess independently the probability that petitioner committed the crime charged." *Giordenello* v. *United States*, 357 U.S. 480, 487; see *Jaben* v. *United States*, 381 U.S. 214, 224–225. As the court of appeals held (Pet. App. 6a), the fact that the

recitals contained in the affidavits were not formally restated in the complaint did not invalidate the warrant in these circumstances. See *United States* v. *Ventresca*, 380 U.S. 102, 108.

Petitioner also urges that certain rent receipts and telephone bills were not properly seized as "instrumentalities and means by which" the crime was committed (Pet. 32–36; see F.R. Crim. P. 41(b)(2)). Petitioner was lawfully arrested, however, and the items were properly seized as an incident to that arrest. *Marron* v. *United States*, 275 U.S. 192, 198–199.[2] In addition, as the court of appeals noted (Pet. App. 7a), these items were of no significant evidentiary value here. Neither the receipts nor the bills were in petitioner's name. They were relevant only to show that petitioner rented the apartment and the telephone under an assumed name—facts fully established by uncontroverted independent evidence.

3. Petitioner contends that his conviction rested upon hearsay, and thus violated the Sixth Amendment, because the arresting agent testified that he placed

[2] It is immaterial that, as petitioner points out (Pet. 33), the court of appeals considered only the search warrant as justification for the seizure, since the arresting officers had dual authority (from both the search warrant and the lawful arrest) to conduct their search. This is not a case such as *Giordenello* v. *United States*, *supra*, 357 U.S. at 488, where belated injection of a new theory unfairly deprives petitioner of an adequate opportunity to respond. Petitioner, from the beginning, has availed himself of the opportunity to attack the validity of the arrest, and there was no additional evidence which he could have adduced or cross-examination in which he could have engaged which could possibly have developed that the arrest, although lawful, did not justify the seizure.

wagers with Mento, and that in each instance Mento dialed telephone number 836-0254, asked for "Joe" or "Stash," and repeated the bet (Pet. 27-32). This evidence, however, was not hearsay. It became relevant when connected with the facts that petitioner was known by the names "Joe" and "Stash," that he rented both the telephone with number 336-0254 and the apartment where it was located, and that calls seeking to place wagers with "Joe" and "Stash" were received by the agent on that telephone after the arrest. Mento's conduct thus essentially constituted circumstantial proof of petitioner's guilt, not extrajudicial assertions introduced as bearing upon petitioner's guilt because of their truth.

4. Finally, petitioner contends that he was entitled to an instruction concerning a lesser included offense (Pet. 18-23). The necessity for giving such an instruction depends upon the existence of "disputed issues of fact which would enable the jury rationally to find that" the defendant had committed the lesser but not the greater offense. *Sansone* v. *United States*, 380 U.S. 343, 351. In *Altiere* v. *United States*, No. 100, O.T., 1965, decided January 17, 1966, the United States thus conceded that, in a prosecution under 26 U.S.C. 7203 for willful failure to purchase a tax stamp and to register as required by 26 U.S.C. 4411 and 4412, the defendant was entitled to an instruction concerning the lesser offense of non-willful failure embraced by 26 U.S.C. 7262 because proof of defendant's knowledge of the registration and stamp requirements was left to inferences to be drawn from his general conduct. In such a case, we agreed, the

jury could rationally find failure to pay and register while at the same time finding that the failure had not been willful. See Memorandum for the United States in No. 100, O.T., 1965.

After considering petitioner's contentions based upon *Sansone* and the government's Memorandum in *Altiere*, the court of appeals held that those principles did not apply in this case (Pet. App. 7a–12a). This decision was correct. Petitioner here offered no evidence, resting his defense upon his exculpatory statement to the arresting agent that he did not need a wagering tax stamp because he did not take bets but only gambled for a living (Pet. App. 4a). Petitioner thus did not claim lack of knowledge of the requirements of Sections 4411 and 4412—indeed he acknowledged his familiarity with them. His claim was that he was not in the business of taking bets and thus was not within the ambit of those two sections. Thus, once the jury found that petitioner was in fact in the business of taking bets—a finding necessary to conviction under either Section 7203 or Section 7262—there was no way in which they could rationally have found him guilty of the lesser but not the greater offense unless they found that petitioner genuinely believed that his actual activities—as opposed to those he claimed to be engaged in—did not constitute the business of taking bets. Petitioner made no such claim at the trial and, as the court of appeals found, "there was nothing to suggest that the activity proved against him was so close to the line that he might reasonably have thought the law inapplicable to it" (Pet. App. 12a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

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